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### "I Solemnly Swear to Tell the Truth, Maybe!" *State v. Douglas*, 222 Neb. 833, 388 N.W.2d 801 (1986)

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“I Solemnly Swear to Tell  
the Truth, Maybe!”

*State v. Douglas*, 222 Neb. 833, 388 N.W.2d 801 (1986)

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I. INTRODUCTION

The Nebraska Supreme Court recently took another step in the series of examinations into the official conduct of former Nebraska Attorney General Paul Douglas. In 1984 the court found that Douglas had not committed impeachable acts while in office.<sup>1</sup> In 1986 the court decided that for purposes of the Nebraska perjury statute,<sup>2</sup> a person under oath cannot commit perjury while testifying before a legislative committee, even if that person were to declare “any matter to be fact,

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1. *State v. Douglas*, 217 Neb. 199, 349 N.W.2d 870 (1984).

2. NEB. REV. STAT. § 28-915 (1985). Section 28-915(1) provides:  
Perjury; subornation of perjury; penalty. (1) A person commits perjury if, having given his oath or affirmation in any judicial proceeding or to any affidavit on undertakings, bonds, or recognizances or in any other matter where an oath or affirmation is *required by law*, he deposes, affirms or declares any matter to be fact, knowing the same to be false, or denies any matter to be fact, knowing the same to be true. *Id.* (emphasis added).

knowing the same to be false or den[y] any matter to be fact, knowing the same to be true."<sup>3</sup> That decision, *State v. Douglas*,<sup>4</sup> reversed Douglas' perjury conviction. The conviction was based upon statements made by Douglas while testifying before a legislative committee. This article will examine the coherency of the legal analysis in *State v. Douglas*.

## II. *STATE v. DOUGLAS*

### A. Background

On November 1, 1983, Commonwealth Savings Company ("Commonwealth") was declared insolvent by the Nebraska Department of Banking and Finance. On January 4, 1984, the Nebraska Unicameral established the Commonwealth Committee ("Committee") to investigate the circumstances of the Commonwealth failure.<sup>5</sup> On February 9, 1984, the Committee authorized their chairperson to set a date to investigate the actions of then Attorney General Paul Douglas in relation to Commonwealth.<sup>6</sup> On February 25, 1984, Douglas appeared before the Committee, took an oath, and testified about his past associations with a former director of Commonwealth.<sup>7</sup>

Based on the testimony given by Douglas, a grand jury returned an indictment that charged Douglas with perjury and misdemeanor obstruction of governmental operations.<sup>8</sup> A jury found Douglas guilty of perjury with respect to each of the three statements made to the Com-

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3. *Id.*

4. 222 Neb. 833, 388 N.W.2d 801 (1986).

5. L.R. 229, 88th Leg., 2d Sess., 1984 Legis. J. 179 (Jan. 4, 1984), established the Commonwealth Committee.

6. *State v. Douglas*, 222 Neb. 833, 834, 388 N.W.2d 801, 802 (1986).

7. *Id.*, 388 N.W.2d at 802.

8. Count I charged Douglas with perjury in violation of NEB. REV. STAT. § 28-915(1) (1985) by alleging that:

[Douglas] did, after having given his oath or affirmation in a matter where said oath or affirmation was required by law, and before an authority having full power to administer the same, said being the Special Commonwealth Committee of the Legislature of Nebraska, depose, affirm or declare the following matters to be fact, to-wit:

That he paid income tax on all of the payments he received from Marvin E. Copple for services he performed for Marvin E. Copple.

That the payments he received from Marvin E. Copple for the services he performed for said Marvin E. Copple, totalled Thirty-two Thousand Five Hundred Dollars (\$32,500).

That his action as Attorney General of Nebraska has not been influenced by his business or personal relationships with Marvin E. Copple.

Further, that at the time he, Paul L. Douglas, deposed, affirmed or declared said matters to be fact he knew the same to be false.

Count II charged Douglas with obstruction of justice under NEB. REV. STAT. § 28-901(1) (1985). *Id.* at 834-35, 388 N.W.2d at 802.

mittee.<sup>9</sup> Douglas was sentenced to three years probation, fined \$25,000, required to contribute 500 hours to community service and pay all costs of prosecution.<sup>10</sup>

Douglas appealed the conviction to the Nebraska Supreme Court. The only assignment of error on appeal relevant to this discussion was:

The Court erred in failing to quash or dismiss Count I of the indictment because it failed as a matter of law to allege facts which would constitute perjury since the statements were made in a setting where no oath was required by law and the statements were not material to the Committee's inquiry.<sup>11</sup>

## B. Issue

On appeal, Douglas argued that no matter what he had said while testifying before the Committee, a perjury conviction could not be based on such statements. His position was that even though he had taken an oath before testifying, the oath was not an oath for purposes of the Nebraska perjury statute.<sup>12</sup>

The language of the Nebraska perjury statute, "in any other matter where an oath or affirmation is required by law," provided the sole basis for Douglas' conviction since the Committee hearing was not a judicial proceeding.<sup>13</sup> Douglas argued that a specific statute must *require* that an oath be administered before an individual can be convicted of perjury.<sup>14</sup> Douglas argued that there was no requirement that witnesses testifying before a legislative committee testify under oath;<sup>15</sup> therefore, because the oath he took was not "required by law," he could not be convicted of perjury.<sup>16</sup>

The State argued that the phrase "required by law" meant that the oath must be administered by an individual or entity possessing the authority to administer the oath. The Committee clearly had the authority to administer the oath through two grants of power.<sup>17</sup> However, Douglas argued that since a legislative committee "*may* administer oaths," the discretion present in the authority dictated that

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9. *Id.* at 835, 388 N.W.2d at 802. The jury found Douglas not guilty of obstruction of justice.

10. Brief of Appellant at 1-2, *State v. Douglas*, 222 Neb. 833, 388 N.W.2d 801 (1986) (No. 85-245).

11. *Id.* at 2.

12. *Id.* at 13.

13. *State v. Douglas*, 222 Neb. 833, 836, 388 N.W.2d 801, 803 (1986).

14. *Id.*, 388 N.W.2d at 803.

15. Brief of Appellant at 15, *State v. Douglas*, 222 Neb. 833, 388 N.W.2d 801 (1986) (No. 85-245).

16. *State v. Douglas*, 222 Neb. 833, 837, 388 N.W.2d 801, 803 (1986).

17. NEB. REV. STAT. § 50-103 (1984) provides: "Any member may administer oaths in the Legislature, and while acting on a committee may administer oaths on the business of such committee." *Id.* NEB. REV. STAT. § 50-406 (1984) provides in part: "In the discharge of any duty herein imposed the council, or any committee thereof, shall have authority to administer oaths . . . ." *Id.*

the oath was not "required by law" for purposes of the perjury statute, and therefore the oath could not support a perjury conviction.

The issue on appeal was whether the oath taken by Douglas prior to testifying before the Committee was one which was "required by law" for purposes of the Nebraska perjury statute.

### C. Holding

The court held that "since . . . there is no Nebraska statute explicitly requiring an oath to be administered to individuals testifying before a legislative committee, Douglas' sworn testimony before the Special Commonwealth Committee could not have provided the basis for prosecution under § 28-915."<sup>18</sup> The conviction was reversed and the matter was remanded with directions to quash the indictment and dismiss the proceedings.<sup>19</sup>

The court's analysis in *Douglas* reveals three reasons for the holding. First, the court adopted the view of *Saunders v. State*,<sup>20</sup> a Texas Criminal Court of Appeals opinion which proposed that an authorization to administer an oath is not sufficient to meet the "required by law" language of a perjury statute.<sup>21</sup> Second, the court believed that the legislative history of § 28-915 indicated that an oath taken when testifying before a legislative committee was not an oath that could support a perjury conviction.<sup>22</sup> Finally, the court reasoned that, as with all criminal statutes, a strict construction of the Nebraska perjury statute was required.<sup>23</sup> Strict construction of the Nebraska perjury statute dictated that the authority to administer the oath did not make the oath one which was required by law.<sup>24</sup>

## III. ANALYSIS

### A. Case Law

#### 1. Majority View

Reported cases exist which are factually similar to *Douglas*. In *Douglas*, the State argued:

[T]he majority rule is that if a governmental body, authority or agency is

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18. *State v. Douglas*, 222 Neb. 833, 843, 388 N.W.2d 801, 807 (1986).

19. *Id.*

20. 170 Tex. Crim. 358, 341 S.W.2d 173 (1960).

21. *State v. Douglas*, 222 Neb. 833, 839, 388 N.W.2d 801, 804 (1986).

22. *Id.* at 840-842, 388 N.W.2d at 805-807.

23. *Id.* at 838, 388 N.W.2d at 804.

24. The court never did state that the statute authorizing the oath must literally say "required by law." The language "shall be administered" of NEB. REV. STAT. § 23-1807 (1983) (dealing with coroners' inquests), is sufficient to meet the "required by law" test of the Nebraska perjury statute, as is "all witnesses shall be duly sworn" of NEB. REV. STAT. § 81-885.18(5) (1981) (concerning Real Estate Commission hearings). *State v. Douglas*, 222 Neb. 833, 843, 388 N.W.2d 801, 807 (1986).

vested with the statutory authority to require that testimony be adduced in its proceedings under oath, even though the exercise of that authority is not mandatory, such testimony adduced under oath may properly be the subject of a perjury prosecution.<sup>25</sup>

If a majority rule is established through a count of cases, the State's assertion is correct. With one exception, all of the relevant, reported cases dictate that the oath taken by Douglas was one which was "required by law," and therefore able to support a perjury conviction.<sup>26</sup>

The State argued that at least three cases established the majority rule.<sup>27</sup> The case most factually similar to *Douglas* is *Commonwealth v. Giles*.<sup>28</sup> In *Giles*, the defendant appeared before a legislative committee called the Crime Commission,<sup>29</sup> and took an oath which the committee was authorized to give.<sup>30</sup> The perjury statute in effect in Massachusetts at the time was very similar to the perjury statute in *Douglas*.<sup>31</sup> The Massachusetts Supreme Court noted that, as a committee of the state legislature, the Crime Commission had the authority to require that an oath be administered to individuals testifying before it.<sup>32</sup> The Commonwealth Committee questioning Douglas had the same power to require that an oath be taken by Douglas.<sup>33</sup>

The court in *Giles* held that, even though no Massachusetts statute specifically required that an oath be administered to individuals testifying before the Crime Commission, the fact that the Crime Commission was authorized to administer and require an oath was sufficient to satisfy the language "required by law" in the Massachusetts perjury statute.<sup>34</sup> *Giles* indicates that the oath taken by Douglas is one that could be construed as "required by law."

However, the Nebraska Supreme Court disregarded the *Giles* rea-

25. Brief of Appellee at 13, *State v. Douglas*, 222 Neb. 833, 388 N.W.2d 801 (1986) (No. 85-245).

26. That exception is *Saunders v. State*, 170 Tex. Crim. 358, 341 S.W.2d 173 (1960). *Saunders* is discussed at pages 307-09, *infra*.

27. Those cases are: *People v. Watson*, 85 Ill. App. 3d 649, 406 N.E.2d 1148 (1980); *State v. Salafia*, 29 Conn. Supp. 305, 284 A.2d 576 (1971); and *Commonwealth v. Giles*, 350 Mass. 102, 213 N.E.2d 476 (1966).

28. 350 Mass. 102, 213 N.E.2d 476 (1966).

29. The Crime Commission was a legislative committee charged with investigating corrupt practices involving government officials and a private corporation. *Id.* at 112, 213 N.E.2d at 483.

30. Massachusetts legislative committee members "may administer oaths to persons examined before . . . committee[s]" under MASS. GEN. LAWS ANN. ch. 3, § 27 (West 1986). This authority is similar to that possessed by the Commonwealth Committee. See *supra* note 17.

31. The Massachusetts perjury statute provided, in relevant part: "[W]hoever, being required by law to take an oath or affirmation, wilfully swears or affirms falsely in a matter relative to which such oath or affirmation is required, shall be guilty of perjury." MASS. GEN. LAWS ANN. ch. 268, § 1 (West 1970).

32. *Commonwealth v. Giles*, 350 Mass. 102, 108, 213 N.E.2d 476, 481 (1966).

33. NEB. LEG. R. 3, § 19(E)(ii) (1983).

34. *Commonwealth v. Giles*, 350 Mass. 102, 108, 213 N.E.2d 476, 481 (1966).

soning in *Douglas* stating that the *Giles* majority relied "extensively upon a close examination of the legislative history of the Massachusetts perjury statute," and the court found the dissent in *Giles* to be "more persuasive."<sup>35</sup> This reasoning is problematic since the dissent in *Giles* also used an extensive examination of legislative history to support its position,<sup>36</sup> so that reliance on legislative history provides no basis on which to distinguish the *Giles* majority from the dissent as the court in *Douglas* implied. The Nebraska court did not articulate how the *Giles* statutory construction distinguished *Giles* from *Douglas*, or why the dissent proved more persuasive.

In *People v. Watson*,<sup>37</sup> the defendant appealed a perjury conviction resulting from sworn testimony she gave before the State Board of Elections.<sup>38</sup> The perjury statute in effect in Illinois stated that an oath must be required to support a conviction.<sup>39</sup> The authority of the State Board of Elections was similar to that of the Commonwealth Committee, in that both "shall have the power to administer oaths."<sup>40</sup> The defendant contended that since the Board was not required to administer the oath, she could not be convicted of perjury under the Illinois statute. The court disagreed, holding that where the oath was authorized, it could support a perjury conviction.<sup>41</sup>

Despite the applicability of *Watson* to the issue raised in *Douglas*, the Nebraska Supreme Court failed to distinguish *Watson*, or to even mention the case. The court should have been aware of *Watson* since the State did discuss *Watson* in its brief.<sup>42</sup>

Finally, in *State v. Salafia*,<sup>43</sup> four defendants filed motions to quash perjury charges based on false testimony given before a coroner, while under oath.<sup>44</sup> The perjury statute in Connecticut expressly limited a conviction to occasions "when an oath or affirmation is required by law."<sup>45</sup> Coroners in Connecticut are officers authorized to "admin-

35. *State v. Douglas*, 222 Neb. 833, 839, 388 N.W.2d 801, 805 (1986).

36. *Commonwealth v. Giles*, 350 Mass. 102, 116-118, 213 N.E.2d 476 486-87 (1966) (Kirk, J., dissenting).

37. 85 Ill. App. 3d 649, 406 N.E.2d 1148 (1980).

38. *Id.* at 650, 406 N.E.2d at 1150.

39. The Illinois perjury statute provided: "A person commits perjury when, under oath or affirmation, in a proceeding or in any other matter where by law such oath or affirmation is required, he makes a false statement, material to the issue or point in question, which he does not believe to be true." ILL. REV. STAT. ch. 38, para. 32-2(a) (1979).

40. The State Board of Election had the authority to administer oaths under ILL. REV. STAT. ch. 46, para. 10-10 (1979). For the Commonwealth Committee's authority see *supra* note 17.

41. *People v. Watson*, 85 Ill. App. 3d 649, 652, 406 N.E.2d 1148, 1151 (1980).

42. See Brief of Appellee at 16, *State v. Douglas*, 222 Neb. 833, 388 N.W.2d 801 (1986) (No. 85-245).

43. 29 Conn. Supp. 305, 284 A.2d 576 (1971).

44. *Id.* at 306, 284 A.2d at 577.

45. The relevant Connecticut perjury statute read: "Any person who wilfully or cor-

ister oaths.”<sup>46</sup> The defendants argued that since a coroner is not required to administer an oath, a coroner’s hearing is not an occasion “when an oath or affirmation is required by law.”<sup>47</sup>

The Connecticut court responded to the defendants’ arguments by stating:

Even if such a claim were sound, where the coroner, in the lawful exercise of his authority, has chosen to perform his official duty by placing a witness under oath, clearly it is an occasion “when an oath or affirmation is required by law.” [citation omitted] The witness could be compelled to attend the hearing and could not refuse to testify under oath without being subject to contempt.<sup>48</sup>

The court concluded that where the coroner had the authority to administer an oath, the oath was one which was “required by law” for purposes of the Connecticut perjury statute.<sup>49</sup>

The Nebraska perjury statute is similar to the statute in *Salafia*.<sup>50</sup> Also, the Commonwealth Committee had the same authority to administer an oath, and to compel the attendance of witnesses.<sup>51</sup> *Salafia* is, therefore, factually similar to *Douglas*. However, the Nebraska Supreme Court once again failed to mention this applicable opinion, even though the State discussed *Salafia* in its brief.<sup>52</sup>

The above cases support the State’s contention that a majority of jurisdictions which have addressed the issue in *Douglas* have found that where the administering of an oath is authorized, the oath is one which is “required by law” for purposes of a perjury statute. In fact, of the reported cases, only one case, *Saunders v. State*,<sup>53</sup> has not adopted this view. The Nebraska Supreme Court decided to adopt *Saunders*.

## 2. *Saunders v. State*

In *Saunders*, the Texas Court of Criminal Appeals addressed the question of whether false testimony given before an investigatory committee of the Texas Legislature constituted perjury under a statute which defined perjury as a false statement made under oath or

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ruptly swears, affirms or testifies falsely to any material matter when an oath or affirmation is required by law [shall be guilty of perjury].” CONN. GEN. STAT. § 53-143 (1960).

46. CONN. GEN. STAT. § 1-24 (1969).

47. *State v. Salafia*, 29 Conn. Supp. 305, 307, 284 A.2d 576, 577 (1971).

48. *Id.* at 311-12, 284 A.2d at 579.

49. *Id.* at 312, 284 A.2d at 580.

50. Compare the Nebraska perjury statute, note 2, *supra*, with the Connecticut perjury statute, note 45, *supra*.

51. The Commonwealth Committee had the authority to subpoena witnesses under NEB. REV. STAT. § 50-105 (1984). For the power to administer oaths see *supra* note 17.

52. See Brief of Appellee at 14, *State v. Douglas*, 222 Neb. 833, 388 N.W.2d 801 (1986) (No. 85-245).

53. 170 Tex. Crim. 358, 341 S.W.2d 173 (1960).



affirmation in "circumstances in which [such] oath or affirmation is required by law."<sup>54</sup> Like the Commonwealth Committee, the Texas committee was empowered to administer an oath.<sup>55</sup>

The court in *Saunders* asked the question: "Can it be said that an oath administered by [a legislative committee is] . . . one which is required by law?"<sup>56</sup> The answer and the extent of the court's analysis: "We think not."<sup>57</sup> From the one page majority opinion and a concurring opinion of *Saunders*, the court in *Douglas* concluded:

The general proposition established in *Saunders v. State*, [citation omitted] therefore, is that for an oath to be one which is "required by law," a specific statute must explicitly require that an oath be administered. That an individual or entity possesses the authority to administer an oath is not sufficient to implicate the more restrictive language "required by law."<sup>58</sup>

Adoption of the minority view espoused by *Saunders* is problematic for at least two reasons. First, the dissent in *Saunders* tried to illustrate that the court had not considered the implications of its holding by pointing out that Texas also had no statute "specifically requiring witnesses to be sworn in judicial proceedings (in court)."<sup>59</sup> The dissent argued, and reasonably so, that the court had not sufficiently considered the effect of a holding so broad as to allow a person under oath to lie in a judicial proceeding with impunity.<sup>60</sup> Similarly, the Lancaster County trial court, in responding to Douglas' motion to quash his indictment because the oath was not "required by law," commented, "[a] reading of the *Saunders* case does not leave one with the impression that it represents careful legal analysis."<sup>61</sup>

Second, it is informative to recognize that the Texas House and Senate amended the Texas perjury statute shortly after *Saunders*. In 1960, when *Saunders* was decided, perjury could only be committed "under circumstances in which an oath or affirmation [was] required by law."<sup>62</sup> The Texas perjury statute was amended in 1961 to include any oath "necessary for the conduct of any official hearing, inquiry, meeting, or investigation by any legislative committee or other instrumentality of government having legal authority to issue process for

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54. TEX. PENAL CODE ANN. art. 302 (Vernon 1952).

55. The Texas committee's authorization came from TEX. REV. CIV. STAT. ANN. art. 5429a (Vernon 1958) which states that a committee "is empowered to administer oaths to witnesses in any case under their examination." *Id.*

56. *Saunders v. State*, 170 Tex. Crim. 358, 360, 341 S.W.2d 173, 174 (1960).<sup>f</sup>

57. *Id.*

58. *State v. Douglas*, 222 Neb. 833, 839, 388 N.W.2d 801, 804-05 (1986).

59. *Saunders v. State*, 170 Tex. Crim. 358, 368, 341 S.W.2d 173, 179 (1960) (Woodley, J., dissenting).

60. *Id.*

61. *State v. Douglas*, Doc. 66 Page 285, at 14 (Order of Lancaster Co. Dist. Court Feb. 15, 1985).

62. See *supra* note 54 and accompanying text.

the attendance of witnesses.”<sup>63</sup> One could reasonably argue that the construction given the statute in *Saunders*, to exclude oaths taken before a legislative committee, induced the Texas House and Senate to statutorily overrule *Saunders* one year after the opinion was written. This action may illustrate disagreement with the construction given the statute in *Saunders*<sup>64</sup> and helps to explain why, in the twenty-seven years since *Saunders* was rendered, no reported opinion has ever cited the case as authority until *Douglas*.

An examination of the reported cases indicates that the most current,<sup>65</sup> and a majority of the cases hold that an authorization to administer an oath is sufficient to meet the “required by law” language of relevant perjury statutes. The court in *Douglas* chose not to follow the majority rule. Following the minority rule is not, in and of itself, unwise, but the court never articulated why the majority rule should be disregarded in favor of the minority rule. *Saunders* provided no analysis for its conclusion, and the court in *Douglas* gave little justification for its adoption of *Saunders*. It is strange to ignore a majority view without discussion while adopting a minority view which other courts have ignored, and which the Texas House and Senate took affirmative steps to nullify.

## B. Legislative History

The court in *Douglas* found the legislative history of the Nebraska perjury statute significant after performing an accurate analysis of the history. The Nebraska perjury statute’s “required by law” language has remained unchanged for at least one hundred years.<sup>66</sup> The court

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63. TEX. PENAL CODE ANN. art. 302 (Vernon Supp. 1973).

64. According to the Legislative Reference Library for the Texas House and Senate, no legislative history was compiled for Texas statutes prior to 1973. Telephone interview with Sally Reynolds, Director of Legislative Reference Library (Oct. 17, 1986). Therefore, one can only speculate as to the legislative reaction to *Saunders*. The Texas House and Senate may have believed that *Saunders* was correct and that the Texas perjury statute was flawed. Conversely, the legislative bodies may have disagreed with *Saunders* and decided to amend the perjury statute in 1961 to prevent the reoccurrence of such statutory construction. Whatever the motivation for the amendment, it is clear that the Texas House and Senate wanted the sanctions for perjury to extend to materially false testimony given before a legislative committee.

65. *Saunders*, decided in 1960, is the oldest of the relevant cases discussed. The more current view holds that testimony given before a legislative committee authorized to give an oath can support a perjury conviction. For the dates of those opinions see *supra* note 27.

66. NEB. GEN. STAT. ch. 58, § 155 (1873) stated in part: “If any person having taken a lawful oath, or made lawful affirmation in any judicial proceeding, or in any other matter where, *by law, an oath or affirmation is required . . .*” *Id.* (emphasis added). The “required by law” language has survived several criminal code revisions and was a part of the Nebraska perjury statute construed in *Douglas*. See *supra* note 2.

found this fact important, since an overall revision of the criminal statutes in 1977 failed to change the "required by law" standard in the perjury statute.<sup>67</sup>

In 1969, the Nebraska Legislature passed a resolution authorizing a general revision of the Nebraska Penal Code.<sup>68</sup> Pursuant to the resolution, a commission was formed to study the entire penal code. The commission recommended that the Legislature adopt the Model Penal Code provision concerning perjury.<sup>69</sup> At the time of the revision of § 28-915, the Model Penal Code stated that "[a] person is guilty of perjury . . . if in any official proceeding he makes a false statement under oath."<sup>70</sup> "Official proceeding means a proceeding heard or which may be heard before any legislative, judicial, administrative or other governmental agency . . . ." <sup>71</sup> Clearly an oath taken before a legislative committee would have supported a perjury conviction under the statute recommended by the revision committee.<sup>72</sup>

The Model Penal Code provision was introduced for adoption in 1973.<sup>73</sup> However, the bill was amended with the Model Penal Code language being struck in favor of the language contained in § 28-915.<sup>74</sup> The revision had proposed a significant expansion of the perjury statute through adoption of the Model Penal Code provisions. However, the Legislature amended the proposed perjury statute to such an extent that the bill which was finally passed did not differ significantly from any previous perjury statute. The court stated:

[W]e find it persuasive that the Nebraska Legislature, in enacting § 28-915, chose not to adopt the Model Penal Code provision but, instead, expressly rejected the broad language of the Model Penal Code and elected to adhere to the general notion originally expressed in § 28-701, that criminal perjury is limited to situations where an oath is "required by law."<sup>75</sup>

The court interpreted the adoption of the restrictive language of § 28-915 as an indication of the Legislature's intent to have the perjury statute construed strictly and applied narrowly. The court stated that to do otherwise would be "to create, in the guise of judicial construction, a new perjury statute."<sup>76</sup> A fair reading of the legislative history indicates that on the close calls, where a liberal reading of the statute and public policy might call for a conviction under the statute, the statute should be construed strictly to preclude the conviction.

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67. *State v. Douglas*, 222 Neb. 833, 842, 388 N.W.2d 801, 806 (1986).

68. L.R. 39, 80th Leg., 2d Sess., 1969 Legis. J. 1589 (Apr. 22, 1969).

69. *State v. Douglas*, 222 Neb. 833, 841, 388 N.W.2d 801, 806 (1986).

70. MODEL PENAL CODE § 241.1(1) (1985).

71. *Id.* at § 240.0(4).

72. *State v. Douglas*, 222 Neb. 833, 841, 388 N.W.2d 801, 806 (1986).

73. L.B. 8, 83d Leg., 1st Sess. (1973).

74. *State v. Douglas*, 222 Neb. 833, 841, 388 N.W.2d 801, 806 (1986).

75. *Id.* at 842, 388 N.W.2d at 806.

76. *Id.*, 388 N.W.2d at 807.

It is true that no Nebraska statute literally states that the oath which Douglas took was "required by law." However, in undertaking such a literal analysis, the court seemed to place form over substance. First, the court's literal construction of § 28-915, due in part to the legislative history of § 28-915, seems inconsistent with the Legislature's grant of authority to committees to swear witnesses. As a result of *Douglas*, a committee's authority to administer oaths has become an empty delegation of authority. What purpose could the authority to administer an oath have when a witness can testify falsely before a legislative committee with impunity? The court effectively made a mockery of the statutory grant of power to a legislative committee.

Second, the court's construction is not entirely consistent with other legislative enactments. Arguably, a person can be convicted of perjury in Nebraska for falsely testifying before a legislative committee while under oath. When Douglas testified before the Committee, Rule 3 § 19(e)(ii)<sup>77</sup> of the Rules of the Nebraska Unicameral Legislature provided that "[a]ll testimony given or offered at [a committee hearing] . . . shall be under oath or affirmation if the witness has been subpoenaed, and in other cases if the majority of the committee members present at the hearing so decide."<sup>78</sup> Therefore, under the Rules of the Nebraska Unicameral, the Legislature has clearly shown an intent that an oath taken before a legislative committee may be one which is required.<sup>79</sup>

It is true that legislative rules are not a "specific statute explicitly requir[ing] an oath to be administered," as required by the court in *Douglas*.<sup>80</sup> Nevertheless, the rules should be given statutory effect since they are passed by a majority of the Legislature like any other statutory enactment. Through Rule 3 § 19(E)(ii), the Legislature evidenced an intent that an oath could be required when testifying before a legislative committee, and the legislative history of § 28-915 should not be construed so strictly so as to negate that intent.

Finally, the court failed to discuss the fact that Douglas was *actually required* to take an oath before testifying before the Committee.

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77. This is now Rule 3 § 20(E)(ii) of the 1987 Rules of the Nebraska Unicameral Legislature. NEB. LEG. R. 3, § 20(E)(ii) (1987).

78. NEB. LEG. R. 3, § 19(E)(ii) (1983). Section 19 of Rule 3 outlined the subpoena power of a legislative committee.

79. The language "shall be under oath or affirmation" in Rule 3 is similar to the language in NEB. REV. STAT. § 23 - 1807 (1983) and NEB. REV. STAT. § 81-885.18(5) (1981). See *supra* note 25. The court implied that the language of both these statutes meets the "required by law" standard. *State v. Douglas*, 222 Neb. 833, 843, 388 N.W.2d 801, 807 (1986).

80. *State v. Douglas*, 222 Neb. 833, 843, 388 N.W.2d 801, 807 (1986).

### C. Oath was Required by the Committee

When Douglas testified before the Committee, he did not choose to take an oath, he was required to take an oath. The Committee had adopted rules to govern its proceedings, one of which specifically required all testimony to be taken under oath or affirmation.<sup>81</sup> By refusing to attend, be sworn, or to be examined as a witness before the Committee, Douglas could have been punished with contempt.<sup>82</sup> This same contempt sanction is available under Nebraska statutes requiring an oath for purposes of the perjury statute.<sup>83</sup>

The Committee had the authority to require the oath under the resolution establishing the Committee. The resolution provided in part that "[t]he committee shall follow Rule 3, Section 19, of the Rules of the Nebraska Unicameral, regarding subpoena procedure."<sup>84</sup> Rule 3 authorized a majority of the Committee to decide whether Committee witnesses like Douglas would be required to take an oath.<sup>85</sup> By a majority vote, the Committee decided to require that all testimony be taken under oath.

Douglas did take the required oath. The fighting issue was whether this was a required oath for purposes of § 28-915. The State argued that the Legislature was exercising its constitutional power under Article III, Section 10 of the constitution of the State of Nebraska in adopting a rule of procedure for its hearings.<sup>86</sup> The State contended that the Committee rule requiring an oath should have been given the force of law, and therefore, the required oath could support a perjury conviction.<sup>87</sup>

Douglas argued that the Committee's decision to require an oath could not possibly "rise to the dignity of law."<sup>88</sup> Douglas contended that an unconstitutional delegation of power to define what consti-

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81. The Commonwealth Committee Rules provided in part:

"6. That the following described procedures shall be utilized during the Committee meeting: . . .

d. Each witness shall take an oath or affirmation to tell the truth, the whole truth and nothing but the truth . . ."

Brief of Appellee on Motion for Rehearing at 9, *State v. Douglas*, 222 Neb. 833, 388 N.W.2d 801 (1986) (No. 85-245).

82. NEB. REV. STAT. § 50-105 (1984).

83. For example, a witness that is required by law to be sworn before a court under NEB. REV. STAT. § 27-604 (1985), can be punished with contempt under NEB. REV. STAT. § 25-2121 (1985).

84. L.R. 229, 88th Leg., 2d Sess., 1984 Legis. J. 179, 181 (Jan. 4, 1984).

85. See *supra* note 78, and accompanying text.

86. Brief of Appellee at 18, *State v. Douglas*, 222 Neb. 833, 388 N.W.2d 801 (1986) (No. 85-245).

87. Brief of Appellee on Motion for Rehearing at 11, *State v. Douglas*, 222 Neb. 833, 388 N.W.2d 801 (1986) (No. 85-245).

88. Brief of Appellant at 15, *State v. Douglas*, 222 Neb. 833, 388 N.W.2d 801 (1986) (No. 85-245).

tutes a crime or any essential element of a crime would occur if the Committee's decision to require an oath was enforced for purposes of the perjury statute.<sup>89</sup> Basically, Douglas contended that the full Legislature would have had to require that he take the oath before it could be an oath for purposes of § 28-915.

The power to create criminal offenses and prescribe penalties is exclusively vested in the Legislature, and this power cannot be delegated to any administrative or executive body.<sup>90</sup> The scope of the delegable authority to a legislative committee is not clearly defined. Even so, Douglas' arguments were weak, since it is questionable whether any legislative authority was delegated to the Committee.

The Committee was not exercising "power to make a law" by defining what constituted the crime of perjury, as Douglas argued.<sup>91</sup> The elements of perjury are set out in § 28-915, and the Committee in no way changed that definition. At most, the Committee created an atmosphere in which the crime of perjury could be committed by administering an oath that it was authorized to give, just as a court,<sup>92</sup> a coroner,<sup>93</sup> or a real estate commissioner<sup>94</sup> would create such an atmosphere.

Probably the most glaring omission in *Douglas* was the court's complete failure to discuss or discount the fact that the Committee did require Douglas to take an oath. The lack of attention to the issue was not due to the court's ignorance of the issue. Both Douglas and the State discussed the issue at length in their briefs.<sup>95</sup> Also, *Saunders v. State*, the opinion which the *Douglas* court found "applicable to the case before us"<sup>96</sup> analyzed whether the resolution creating the committee pertinent to that case made the oath taken one which was required by law.<sup>97</sup> The court in *Douglas* failed to discuss the question.

The inference is that by not considering the fact that the Committee did require an oath to be administered to Douglas, the court simply did not believe that the oath was one required by law for purposes of § 28-915. The holding of *Douglas* requires that a "specific statute explicitly requires an oath to be administered."<sup>98</sup> Evidently, the court

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89. *Id.*

90. *Lincoln Dairy Co. v. Finigan*, 170 Neb. 777, 104 N.W.2d 227 (1960).

91. Reply Brief of Appellant at 2, *State v. Douglas*, 222 Neb. 833, 388 N.W.2d 801 (1986) (No. 85-245).

92. See *infra* note 106.

93. See *infra* note 107.

94. See *infra* note 108.

95. See Brief of Appellant at 15; Brief of Appellee at 18; Brief of Appellee on Motion for Rehearing at 8-11, *State v. Douglas*, 222 Neb. 833, 388 N.W.2d 801 (1986) (No. 85-245).

96. *State v. Douglas*, 222 Neb. 833, 840, 388 N.W.2d 801, 805 (1986).

97. *Saunders v. State*, 170 Tex. Crim. 358, 359-60, 341 S.W.2d 173, 174 (1960).

98. *State v. Douglas*, 222 Neb. 833, 843, 388 N.W.2d 801, 807 (1986).

did not consider the Committee rule, condoned by the full Legislature, to rise to the status of a statute. If so, the court should have made that finding clear. The fact that Douglas *was required* to take an oath was important enough to warrant a discussion as to why the required oath was not "required by law" for purposes of § 28-915.

#### D. Statutory Construction

In conjunction with the legislative history review, the court also reviewed the basic rules of statutory construction of criminal statutes.<sup>99</sup> The court concluded that a criminal statute must be construed "according to the plain import of the language in which it is written" and "no person shall be punished for an offense which is not made penal by the plain import of the words."<sup>100</sup> "[I]t is a fundamental principal of statutory construction that a penal statute is to be strictly construed."<sup>101</sup>

However, the court has also recognized in other opinions that a criminal statute "should be construed in the context of the objective sought to be accomplished, the evils and mischiefs that are sought to be remedied, and the purpose for which it serves."<sup>102</sup> Courts should adopt a construction which "best harmonizes with the context and apparent policy and objects of the Legislature."<sup>103</sup> Finally, while penal statutes must be strictly construed, "it is not proper to give a strained or unnatural construction."<sup>104</sup>

The statutory construction rules above are based on the need to provide fair notice of what conduct is criminal. Accomplishing the goal of providing fair notice does not mean that every criminal statute should be given the narrowest possible meaning.<sup>105</sup> The question pertinent to *Douglas* was: Did Douglas have fair notice from the Nebraska perjury statute that falsely testifying, while under oath, before the Committee could result in a perjury conviction?

Naturally, a person can be convicted of perjury for violating an oath while testifying as a witness in a judicial proceeding.<sup>106</sup> Few people would dispute that such a witness is on notice that false testimony could result in a perjury conviction. But a person is also susceptible to perjuring himself/herself by deposing, affirming, or declaring any

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99. *Id.* at 837-38, 388 N.W.2d at 804.

100. NEB. REV. STAT. § 29-106 (1985). See also *State v. Ewert*, 194 Neb. 203, 230 N.W.2d 609 (1975).

101. *State v. Suhr*, 207 Neb. 553, 560, 300 N.W.2d 25, 29 (1980).

102. *State v. Lewis*, 184 Neb. 111, 119, 165 N.W.2d 569, 575 (1969).

103. *State v. Reich*, 186 Neb. 289, 291, 183 N.W.2d 223, 224 (1971).

104. *State v. Ewing*, 221 Neb. 462, 467, 378 N.W.2d 158, 162 (1985).

105. *United States v. Speidel*, 562 F.2d 1129, 1131 (8th Cir. 1977).

106. NEB. REV. STAT. § 27-603 (1985) requires that all witnesses in judicial proceedings "shall be required to declare that he will testify truthfully, by oath or affirmation." *Id.*

matter to be fact, knowing the same to be false when testifying before a coroner's inquest<sup>107</sup> or at a real estate license application hearing.<sup>108</sup> Is a legislative committee hearing different from the above proceedings for purposes of providing notice of possible perjury sanctions? Arguably not, especially when the person said to have no notice of possible sanctions is the chief law enforcement official for the State of Nebraska.

Regarding the notice given to a person testifying before a legislative committee by a perjury statute similar to § 28-915, the court in *Giles* commented, "the ordinary meaning of that language would put any person on notice that his conduct will be criminal if he wilfully lies under oath before a body such as [a legislative committee]." <sup>109</sup> None of the cases which have construed perjury statutes similar to Nebraska's have held that the statute fails to give fair notice that false testimony, given while under oath, before a legislative committee, can be used as a basis for a perjury conviction. Similarly, the trial court was very skeptical of any implication that Douglas did not have fair notice of a possible perjury conviction, stating:

There can be little doubt that the statutes of the State of Nebraska and the rules of the Legislature and the Special Commonwealth Committee put the defendant on notice that violation of the oath to tell the truth could result in criminal sanctions. This was not an ordinary legislative committee but an investigative body charged with looking into any possible involvement or wrongdoing by officials of the state with respect to the collapse of a sizable financial institution. The defendant's awareness of the oath is emphasized by his specific reminders to the committee that he was testifying under oath.<sup>110</sup>

The Nebraska Supreme Court did not say whether Douglas had fair notice from § 28-915 that his statements given before the Committee could support a perjury conviction. The *Douglas* opinion cites the rules of strict construction necessary to insure that a potential defendant receives fair notice. However, the opinion never explains how the trial court's construction of the statute with regard to notice was incorrect. Presumably, the court included the rules of construction cited in *Douglas* as support for a reversal of the conviction, but the court failed to take the last step of explaining why Douglas did not have fair notice. This step may have been omitted since it arguably strains the concept of reasonableness to conclude that Douglas did not have fair notice.

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107. NEB. REV. STAT. § 23-1807 (1983). See also *State v. Douglas*, 222 Neb. 833, 843, 388 N.W.2d 801, 807 (1986).

108. NEB. REV. STAT. § 81-885.18(5) (1981). See also *State v. Douglas*, 222 Neb. 833, 843, 388 N.W.2d 801, 807 (1986).

109. *Commonwealth v. Giles*, 350 Mass. 102, 108-09, 213 N.E.2d 476, 481-82 (1966).

110. *State v. Douglas*, Doc. 66 Page 285, at 17 (Order of Lancaster Co. Dist. Court Feb. 15, 1985).



## IV. CONCLUSION

On a first reading, *State v. Douglas* seems well written and thorough. However, after some research several omissions are revealed that do materially affect the soundness of the decision.

First, the clear majority rule among other jurisdictions considering the issue in *Douglas* establishes that the oath taken by Douglas was an oath "required by law" for purposes of perjury statutes like § 28-915. The court's reliance on one opinion of questionable validity is ill-placed.

Second, while the legislative history of the Nebraska perjury statute does indicate that the statute should be construed narrowly, the literal interpretation given the statute by the court effectively gutted the grant of authority to administer oaths given to legislative committees. Also, it is clear that the Legislature has contemplated, through its rules of procedure, that oaths can be required for persons appearing before a committee.

Third, the court did not indicate why Douglas did not have fair notice that his testimony could be used to support a perjury conviction. A statement of all the rules of statutory construction is of little value unless the rules are applied to the facts in an effort to justify the holding.

The Legislature's response to *State v. Douglas* has been predictable and quick. Two legislative bills<sup>111</sup> to amend Nebraska's perjury statute were introduced in the last session of the Legislature for adoption. One bill simply changed the perjury statute so that an oath can support a perjury conviction where the oath is "required or authorized by law."<sup>112</sup> The other bill was patterned after the Model Penal Code perjury provision.<sup>113</sup> Under that bill:

A person is guilty of perjury . . . if in any official proceeding he or she makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he or she does not believe it to be true.<sup>114</sup>

"Official proceeding shall mean a proceeding heard or which may be heard before any legislative, judicial, administrative, or other governmental agency. . . ."<sup>115</sup> Under either bill, an oath given by a legislative committee supports a perjury conviction.

The Legislature did pass L.B. 451 and the bill was approved by Governor Orr on May 29, 1987. The bill was enacted as an emergency amendment and therefore went into effect immediately. Hopefully,

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111. L.B. 451, 90th Leg., 1st Sess. (Jan. 21, 1987) and L.B. 452, 90th Leg., 1st Sess. (Jan. 21, 1987), were introduced to amend NEB. REV. STAT. § 28-915 (1985).

112. L.B. 452, 90th Leg., 1st Sess. (Jan. 21, 1987) (emphasis added).

113. L.B. 451, 90th Leg., 1st Sess. (Jan. 21, 1987).

114. *Id.*

115. *Id.*

the perjury statute as amended will receive a judicial construction which is supported by coherent reasoning.

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